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Supreme Court of the United States

October Term, 1948

No. 158

EDITH MATTHEWS and AGNES BILLINGS,

Petitioners,

v.

MARY WOODY, DONALD B. HOWARD, ROY NELSON, and BENJAMIN HILL,

Respondents.

BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF CASE

(Note: The printed record before this Honorable Court is so meagre that respondents find it extremely difficult to furnish a complete statement of the case with the appropriate page references to the record. Even the attestation clause to the will in question is omitted.)

The will in controversy (R. 2a, 3a) was signed by the testatrix and two subscribing witnesses in the presence of each other on the same occasion and as a part of one continuous transaction (R. 9). One witness testified that the testatrix signed first and the other that the testatrix signed last (R. 7a). (Counsel finds it difficult to follow petitioners' contention here in view of the statements on

page 10 of their brief that both witnesses testified that the "decedent signed first" before the witnesses.)

The trial court heard the testimony and ruled that the testimony showed that the will was properly attested in the District of Columbia and that its ruling would have been the same even if it had been definitely established that the testatrix signed last (so long as the parties signed on the same occasion and as a part of one continuous transaction).

The United States Court of Appeals for the District of Columbia affirmed the judgment of the trial court (R. 9).

As to the question of undue influence, the appellate court found that there was no basis for the contention that there was such evidence (R. 9).

ARGUMENT

I. The Will Was Properly Attested in the District of Columbia Even if the Testatrix Signed Last.

The trial court ruled that, as a matter of law, the will in question was properly executed in the District of Columbia.

The Court of Appeals, in sustaining the trial court, held that "the validity of a will should not depend upon who signs it first; provided, of course, all sign at substantially the same time and in each other's presence, *which they did here*". (Underscoring supplied). In so doing, the court followed the greater weight of authorities in this country, some of which are:

California—In re Silva's Estate, 169 Cal. 116, 145 Pac. 1015;

Colorado—In re Shapter's Estate, 35 Colo. 578, 117 Am. St. Rep. 216, 6 L. R. A. (N. S.) 575, 85 Pac. 688;

Connecticut—O'Brien v. Galagher, 25 Conn. 229;

Illinois—Gibson v. Nelson, 181 Ill. 122, 72 Am. St. Rep. 254, 54 N. E. 901;

Indiana—Harmening, et al. v. Harmening, et al., (1926), 84 Ind. App. 459, 150 N. E. 376, annotated: 6 Boston University Law Review 207, and criticizing and distinguishing *Reed v. Watson,* (1867), 27 Ind. 443;

Kentucky—Swift v. Wiley, 40 Ky. (1 B. Mon.) 114;

Maryland—Sellers v. Hayden, 154 Md. 117, 57 A. L. R. 828, 140 Atl. 56, annotated: 6 New York University Law Quarterly Review 186;

Michigan—In re Horn's Estate, 161 Mich. 20, 26 L. R. A. (N. S.) 1126, 125 N. W. 696;

Mississippi—Gordon v. Parker, 139 Miss. 334, 39 A. L. R. 931, 104 So. 77, annotated: 10 Minnesota Law Review 76;

New York—In re Jones' Estate, (1936), 285 N. Y. Supp. 894, 157 N. Y. Misc. 857, annotated: 21 Cornell Law Quarterly 674 and 5 Fordham Law Review 519;

North Carolina—Cutler v. Cutler, 130 N. Car. 1, 189 Am. St. Rep. 854, 57 I. R. A. 209, 40 S. E. 689;

Ohio—Slemmons v. Toland, 5 Ohio App. 201, 25 O. C. C. (N. S.) 485;

Pennsylvania—Miller v. McNeill, 35 Pa. 217, 78 Am. Dec. 333;

South Carolina—Kaufman v. Caughman, 49 S. Car. 159, 61 Am. St. Rep. 808, 27 S. E. 16;

Virginia—Rosser v. Franklin, 47 Va. (6 Gratt.) 1, 52 Am. Dec. 97;

Wisconsin—Enright v. Griffith, 165 Wis. 601, 163 N. W. 138.

The Court of Appeals held that the requirements of the statute of the District of Columbia on execution of wills had been met (R. 9). That statute (D. C. Code (1940),

section 19-103, 31 Stat. 1433, ch. 854, sec. 1626) reads, as follows:

> "All wills and testaments shall be in writing and signed by the testator, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said testator by at least two credible witnesses * * *."

That statute is strikingly similar to the corresponding statute of the State of Maryland. The appellate court below agreed with the opinion and decision of the Court of Appeals of Maryland in the case of *Sellers v. Hayden, supra,* wherein the precise question was passed on for the first time (1928) and wherein is contained an exhaustive and thorough review of the authorities. To the same effect, see Page on Wills (3rd Edition), Vol. 1, Sec. 372, pages 672 to 677, inclusive.

Examination of the cases cited by petitioners discloses that none of them involved a situation where a witness signed prior to the testator.

The weight of authority clearly holds that a will is not invalidated by the testator signing subsequent to the witnesses where he and the witnesses sign on the same occasion and as a part of one continuous transaction. The exception, of course, is where the particular statute involved specifically prescribes the order of signing wills.

In the case at bar, the trial court's holding that the will was valid and would be so even if the testatrix had signed last, was properly affirmed.

II. The Appellate Court Did Not Err in Finding No Basis for Petitioners' Contention That There Was Evidence of Undue Influence.

There was no evidence before the trial court or the Court of Appeals that the testatrix lacked mental capacity, that she was unduly influenced, that the execution of the will was induced by any fraud or deceit, or that the execution

was invalid. The absence of any such testimony in appellants' appendix below (not "Joint" as stated here on R. 11) is readily understandable. The identical record before the appellate court is now before this Honorable Court (R. 2a-8a, inclusive).

CONCLUSION

It is urged that the petition for writ of certiorari should be denied.

Respectfully submitted,

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